UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	
v.	:	Indictment No. 16-Cr.-212 (LAK)
	:	
CINTRON POWELL,		
	:	
Defendant.		
	:	

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SENTENCING MEMORANDUM

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PRELIMINARY STATEMENT

I'll move out of New York when I get out. I'll move out of New York when I get out. I'll move out of New York when I get out. Cintron Powell repeated this phrase to himself almost like a mantra as he sat in Green Haven Correctional Facility in Stormville, New York, serving his four-year sentence for attempted assault. He had been arrested for the crime when he was only 16 years old along with 18-year-old Andre Bent, one of the other boys from his neighborhood. And that wasn't the first time Mr. Powell's relationship with 2Fly had led to legal trouble. Months earlier he'd had been arrested with Mr. Bent, Robert Pope, Nicholas Bailey, Emile Anderson, Dave and Kevin Mattison, Sean McIntosh and other kids he grew up with. Mr. Powell wanted nothing more to do with his childhood friends, and as his release date drew closer, he had a plan: get as far away from the Bronx as possible.

Mr. Powell tried to persuade his mother to take the family to Florida where her sister lived. In an interview with defense counsel, his mother, Winsome Buchanan recounted how Cintron begged her to move. But she did see any way to make that happen. She knew the boys Cintron – C.J. to the family – hung out with were trouble, but she thought everything would be all right if he just stayed away from them. Hearing the bad news that he would return home to his old neighborhood when he got out of Green Haven, Mr. Powell convinced himself that his mother was right. He just had to do what his parole office told him. Stay away from negative influences. Stop using marijuana. And learn to control his anger.

So he set about with determination to do just that. He attended a drug treatment program at Montefiore Behavioral Health Center. Although he had smoked marijuana every day he had spent outside of prison since the age of 14, Mr. Powell graduated from the program 90 days later with 100% clean urines (11 of them). (PSR at ¶100.) He also completed the anger management course parole referred him to. (PSR at ¶72.) He worked at the CEO (Center for Employment Opportunities) for six months, performing menial labor before leaving to study to take his GED test. (PSR at ¶104; ¶107.) While he was following this prescribed path, Mr. Powell occasionally ran into his friends from 2Fly. He tried to avoid the contact. When he failed his GED, he planned to try again as soon as possible. But there was more contact with old friends. There were phone calls and then parties and before long Mr. Powell was doing what he promised himself in Green Haven that he wouldn't do again: He was fully back in the Bronx and in 2Fly.

Having spent another year in prison since his arrest on this case and facing a five-year mandatory minimum term of incarceration, 22-year-old Mr. Powell sees what that decision cost him:

> I always thought life was hard but all you have to do is remain positive and stay away from all negativity. It took this case right here for me to understand this and I'm ready to move forward with my life. I'm sorry for putting my family through this depressing journey. I also want to apologize to myself for disrespecting myself and losing years of my life that I can't get back. All I can do is live and learn. I definitely learned from this and [am] ready to live peacefully and positively. While incarcerated I learned a lot about myself and what I need to do be successful in this world. I can't dwell on [past] mistake only could learn from them and take each day at a time on progressing myself.

(Letter of Cintron Powell to the Court, attached hereto as Exhibit A.)

I submit this Sentencing Memorandum to provide this and other background information about Cintron Powell to the Court to support his request for a sentence of 60 months. While Mr. Powell pled guilty to committing a serious crime – possession of a firearm in furtherance of a racketeering conspiracy – the factors this Court must consider under 18 U.S.C. §3553(a) weigh in favor of this resolution.

CINTRON POWELL'S BACKGROUND

It didn't really bother me. (Pre-sentence Investigation Report, "PSR," at ¶87.) Those are the words Mr. Powell used during his pre-sentence interview with United States Probation to describe his reaction to his parents' separation. It is hard to decipher whether this characterization is the result of wishful thinking or whether Mr. Powell genuinely fails to appreciate the trauma this upheaval in his life caused him. Nevertheless, it is clear that nine-year-old Cintron was in fact deeply affected by his parents split. There was before the split: They were a family. They had a home and enough money for food and nice clothes and toys. Then there was after the split. While he visited his father regularly, Mr. Powell lived with his mother, who had four older children from another relationship. Mr. Powell's father "provided financial support when requested to do so by his mother", but she still struggled to take care of her five children. (PSR at ¶89.) Mr. Powell recalls they (his mother, his siblings and he) "were evicted twice and 'were often moving from place to place.'" (Id.)

As Mr. Powell got older, the family's financial situation eased. His mother became involved with another man who contributed financially to the running of the household. Mr. Powell's father, now employed for 32 years in the housekeeping department at Mt. Sinai Beth Israel, received increases in his pay over the years, and he was always generous with his son. (PSR at ¶82.) Unfortunately, more money didn't solve all problems. As Mr. Powell entered adolescence he was struggling internally with feelings of alienation and anger. When he was 13 years old he got into a fight with another boy. Mr. Powell was charged with acts that if committed by an adult would constitute robbery. He was adjudicated a juvenile delinquent and sent to Lincoln Hall, a juvenile facility. He stayed there for nine months.

When Mr. Powell was released from Lincoln and reenroll in school, he was held back a grade. Mr. Powell, large for his age, towered over the other students. He looked more like a teacher than a fellow student. This was torment for an already awkward 14-year-old. In addition, Mr. Powell was having trouble in school. There had been no real education in Lincoln, so Mr. Powell lost a year there. Unknown to him at the time, he also had learning disabilities. It wasn't until he was sent to Green Haven two years later that Mr. Powell's mother was given that diagnosis. While he was falling further and further behind at Christopher Columbus High School, Mr. Powell just though he wasn't smart enough to do the work. He could read and write – well – but any kind of math made him freeze. The concepts made no sense. Where to start on a problem? It was all impenetrable.

It seemed better to Mr. Powell to avoid the intense discomfort school brought – the failing, the stares from his classmates, the disapproval of his teachers. Especially when there was marijuana to be smoked – Mr. Powell smoked daily from age 14 on. And, of course, there was 2Fly. Participation in 2Fly meant acceptance. Many of Mr. Powell's grade school friends were members. In his class, Mr. Powell was the oldest boy. In 2Fly, he was one of the youngest. The older boys – and men – in the gang seemed cool. They threw parties. They made music videos. And, yes, they sold drugs, and, yes, some of them had guns. But getting involved didn't present any immediate moral challenge. There was no initiation required. Mr. Powell didn't have to "jump" anyone, or carry a gun, or steal someone's purse to belong. Of course membership in the gang did ultimately involve many of those things.

At home Mr. Powell's family had little or no idea of what was going on in his life. To his mother and father he was their beautiful boy: a good kid, respectful and fun to be around. (Letter of Winsome Buchanan to the Court, attached hereto as Exhibit B.) When he visited with his father, Cintron helped around the house. He was responsible and loving. He had a good attitude. He was nice with the neighbors. (Letter of Cintron Powell, Sr. to the Court, attached hereto as Exhibit C.) Mr. Powell's aunt, Carlene Gordon, felt the same way about Cintron: He was caring, loyal, loving. He was always "wiling to help family & friends in time of need." (Letter of Carlene Gordon to the Court, attached hereto as Exhibit D.)

Ms. Buchanan had five children. Floyd, Kenroy, Roxanne and Kerryanne. Floyd was the oldest, and he went to prison when Cintron was young. But the four younger kids were close. They remain so today. While Mr. Powell clearly had a less salutory side that was nurtured and expressed in his activities with 2Fly, he also was a loving son, brother and uncle. His brother Kenroy describes Cintron as "his world." (Letter of Kenroy Clark to the Court, attached hereto as Exhibit E.) Ten years older than Cintron, Kenroy tried to look out for his younger brother when they were growing up. The brothers told each other it was "rough out there." The "streets ain't nothing but trouble and death." (Id.) As Cintron was in entering his teens Kenroy was beginning his professional life. He took Cintron to work just so he could "have some experience of what it's like in the real word." (Id.) Cintron reveled in the attention. And when Kenroy had a son, Cintron embraced the role of uncle. He spent time with his nephew.

Roxanne was closest to Cintron. She considered herself almost a second mother to her younger brother ("I grew C.J. and treated him as if he was my own son[.])" (Letter of Roxanne Buchanan to the Court, attached hereto as Exhibit F.)

When C.J. began his four-year state sentence, Roxanne grieved. She had a son, M-------. M------'s father, Paul Jeffrey, got to know Cintron also. He found Cintron "smart" and "funny" and "full of potential." (Letter of Paul Jeffrey to the Court, attached hereto as Exhibit G.) The most striking thing about C.J. though was how close he was to the kids in the family. Uncle C.J. and Roxanne's son M------ played basketball together. C.J. took M------ to the park, brought home food, cheered him up if he was "sad or mad." (Letter of M------ W----- to the Court, attached hereto as Exhibit H.) Cintron helped young M------- "with all the problems found in [his] life." (Id.) So when C.J. went to jail, M------ felt the loss perhaps more acutely than anyone else, as he explains in a letter to the Court: "The first time he went in it was four years before I saw him. I just want [him] to come home and stay here till the day he dies." (Id.) Today M------ still has this hope – of Uncle C.J. coming home and not going "down the road of criminal mastermind." (Id.)

The picture that emerges from the available information is that Mr. Powell, while not the innocent his parents believed him to be before his prosecution in the instant case, also is not the hardened 2Fly member the PSR depicts. Mr. Powell is more than the sum of his past criminal association and convictions. He is loving and kind son. He is an involved, hand-on uncle with his nephews. With sufficient supervision he can avoid using drugs and find work and conquer his anger.

RELATIVE CULPABILITY IN THE OFFENSE

Another factors this Court should consider when determining what sentence is appropriate to impose on Mr. Powell is the need to avoid sentencing disparities among similarly situated defendants. Of course, each individual's background and history is unique, and defendants' roles in an offense vary. However, the sentences that have been imposed on other defendants in this case, in conjunction with the parties' sentencing submissions, do provide some basis for comparison. Docket entries on PACER show that 14 defendants have been sentenced. Six of them received sentences of time served. Five of the six – Andrew Moncrieffe, William Rodriguez, Courtney Green, Robert Munoz, Kareem Sanders and Vaughn Washington – pled guilty to conspiracy to distribute and possess with intent to distribute a controlled substance. The controlled substance in each case was marijuana. The sixth defendant who was sentenced to time served was Shawn Walker. Mr. Walker pled guilty to racketeering conspiracy. The predicate acts attributable to him involved distribution of marijuana. Each sentence represented a significant variance from the applicable Guideline ranges, which spanned from 21 to 27 months to 24 to 30 months. (PACER documents 720, 845, 721, 805, 913, 851.)

Marcel Bent, like Mr. Walker, pled guilty to racketeering conspiracy with marijuana distribution as the underlying illegal conduct. However, Mr. Bent had possessed a firearm in relation to the offense, which subjected him to a two-level enhancement of his Guidelines. His stipulated range was 24 to 30 months.

(Government's Sentencing Memorandum of December 15, 2016, PACER document 750, at 1, 5.) He received a sentence of 24 months.

Eric Canales also pled guilty solely to distributing and possessing with intent to distribute marijuana (in violation of 21 U.S.C. §841(b)(1)(C)). The parties stipulated in the plea agreement that his Guideline range was 21 to 27 months. (Defense Sentencing Submission of December 22, 2016, at 1.) However, the United State Probation office concluded that Mr. Canales was a Career Offender within the meaning of Guidelines §4B1.1 and thus should have a Guidelines range of 188 to 235 months.[1] While it is not clear from documents available on PACER how the Court resolved the question of whether U.S.S.G. §4B1.1 governed Mr. Canales' sentencing, it is clear that he had an extensive prior criminal record. This Court imposed a term of incarceration of 21 months, the lowest end of the Guidelines range stipulated in the plea agreement.

None of these sentences, which were imposed on defendants who were convicted solely of charges related to marijuana distribution, provides a meaningful basis for comparison. Also dissimilar to Mr. Powell's situation is that faced by co-defendant Aaron Rodriguez. The government alleged that Mr. Rodriguez was a leader – or "Big Gun" – of 2Fly. (Government's Sentencing Memorandum of February 13, 2017, PACER document 902, at 1.) He recruited

[1]Because the statutory maximum for Mr. Canales' offense was more than 25 years but less than life, is he were found to be a Career Offender his base offense level would have increased to 34. With three points subtracted for acceptance of responsibility, his total offense level would have been 31. A total offense level of 31 at CHC VI, the category applicable to Career Offenders, triggers a Guidelines range of 188 to 235 months.

members into the gang, ordered that other members commit acts of violence and "managed the gangs' narcotics trafficking." (Id. at 6.) The government considered Mr. Rodriguez to "be, by far, the most significant defendant" in the case who had yet been sentenced. (Id. at 6-7.) His stipulated Guideline range apparently was 168 to 210 months. Probation calculated his range as 188 to 235 months. (Id. at 2.) The Court sentenced Mr. Rodriguez to a term of well-below Guidelines term of 160 months.

Defendants Damon Parrish, Brandon Anderson, Bruce Washington and Devon Walker were more similarly situated to Mr. Powell. While Damon Parrish's Guideline range of 37 to 46 months was significantly lower than Mr. Powell's 60-month range, Mr. Parrish's conduct was equally or more blameworthy. While Mr. Parrish pled guilty solely to marijuana-related charges (violation of 21 U.S.C. §841(b)(1)(C)), the government asserted that he was a "wholesale" supplier to his son, Laquan, one of the leaders of 2Fly. (Government's Sentencing Submission of November 10, 2016, PACER document 671, at 1.) Mr. Parrish also provided a firearm to his son, knowingly that Laquan intended to use the gun to go after someone he believed had stolen $200 from him. (Id. at 5-6.) Mr. Parrish received a non-Guidelines sentence of 24 months.

Devon Walker pled guilty to racketeering conspiracy. He admitted that he had engaged in an act of violence – an assault on a city bus – attendance to his membership in 2Fly. The government alleged that

> [O]n May 15, 2013, along with fellow 2Fly members Kevin Mattison, a/k/a, "Kev," Rodrigo Gonzalez, a/k/a "Frenchy," and Joshua Brown, a/k/a "Josh," Walker participated in an attack on a member of [rival gang] BMB on a public bus in the Bronx. The

> 2Fly members used their fists and were armed with a bat and knives. The bus was filled to capacity with other passengers, ranging from young children to the elderly, who were in fear for their safety.

(Government's Sentencing Memorandum of November 9, 2016, PACER document 666, at 5.) Mr. Walker also "proclaimed his membership in the Gang" by making various reference to his participation in 2Fly in Facebook posting. Mr. Walker's Guideline range was 21 to 27 months. This Court imposed a sentence of 12 months and 1 day.

Brandon Anderson admitted that he conspired to distribute and possess with intent to distribute between 280 and 840 grams of crack. Instead of insisting that Mr. Anderson plead guilty to a violation of 21 U.S.C. §841(b)(1)(A), which would have subjected him to a ten-year mandatory minimum sentence of incarceration, the government entered into a plea agreement under which Mr. Anderson was permitted to pled guilty to the lesser-included offense under 21 U.S.C. 841(b)(1)(C), which carries no mandatory minimum. (Defense Sentencing Submission of December 6, 2016, PACER document 727, at 1; Government's Sentencing Submission of December 15, 2016, PACER document 751, at 6.) Mr. Anderson had a prior youthful offender adjudication for assault in the third degree based on an incident during which "Anderson and four others attacked a victim, who was cut above the eye." (Id.) He also twice been convicted for possession of amount of marijuana consistent with distribution. (Id.)

Mr. Anderson and the government stipulated to a Guidelines range of 78 to 97 months incarceration. Probation calculated the range at 87 to 108 months. Both ranges are higher than the 60-month Guideline sentence applicable to Mr.

Powell. The Court sentenced Mr. Anderson to a term of incarceration of 45 months.

Defendant Bruce Washington also admitted to his involvement in distributing an amount of crack cocaine that would have required a mandatory minimum sentence of ten years. (Defense Sentencing Submission of February 14, 2017, PACER Document 908, at 6.) Ultimately he entered into a plea agreement with the government in which he took responsibility for distributing between 196 and 280 grams of crack. (Id. at 14.) He also admitted possessing a firearm in relation to the offense. He was not required to plead guilty to that charge. Rather, his Guideline offense level was increased by two. (Id. at 13.) His stipulated range of incarceration was 70 to 87 months. (Id. at 1.) He received a below-Guidelines sentence of 60 months.

All of the defendants sentenced thus far, which the exception of Mr. Rodriguez, one of the "Big Guns" of 2Fly, received terms of incarceration of 60 months or substantially less. Yet, several – Damon Parrish, Brandon Anderson, Bruce Washington and Devon Walker – appear to bear culpability similar to Mr. Powell. Thus, imposing a sentence of the mandatory minimum term of incarceration of 60 months on Mr. Powell would serve the goal of avoiding unwarranted sentencing disparities.

MR. POWELL IS COMMITTED TO NOT OFFENDING IN THE FUTURE, AND HE HAD THE ABILITY AND RESOURCES TO AVOID REOFFENDING

Perhaps one of the most significant questions a Court must grapple with in determining the appropriate sentence to impose is also the hardest to answer: How will a defendant behave when he's release from prison. How long does a sentence need to be to incapacitate, punish and deter. There are reasons for this Court to conclude that a sentence of 60 months is sufficient but not greater than necessary to meet these goals in this case. First, a sentence of five years is a severe sentence even when the underlying offense in a ¶924(c) prosecution involves violence. This is especially true given that Mr. Powell has already served significant sentences for the underlying crimes he committed in relation to his membership in 2Fly, including a four-year term of incarceration for attempted assault.[2] A sentence five years also is an objectively long period of time, particularly in the life of a 22 year old.

Mr. Powell also has demonstrated tangible signs of change. He has incurred no infractions in his almost one-year at the MDC, a difficult achievement in light of the often-chaotic environment at the facility. He has remained in close and frequent contact with his family, a strong base of support and guidance. He has told them the truth about himself. That he was involved in criminal activity. That he wasn't only the sweet boy that he let them see before his arrest in this case. Nevertheless, his father has visited Mr. Powell almost every Friday for the past year. His mother comes almost as often.

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[2]The PSR describes the incident that led to this conviction as a robbery during which Mr. Powell and others beat innocent victims inside a commercial establishment. Mr. Powell adamantly denies this. He describes what happened as a fight that broke out when someone Mr. Powell was with began flirting with a woman in the store. Her boyfriend and his friends took offense, and a melee ensued between those men and Mr. Powell and his friends. Mr. Powell does not deny that he hit, and seriously injured, another man in the store. However, this was not incident to an attempted robbery.

Finally, Mr. Powell is deeply remorseful and seems to finally "gets it", as he notes in his letter to the Court:

> I have learned that I was taking life for granted and bringing heartache and pain not only to myself but to my family. I learned that I have to be [a] positive role model for my nephew, who looks up to me and lead him onto not making the same mistakes I made growing up. I want to show my family and my community that this experience right her opened my eyes to a better understanding of life.

(Exhibit A.)

All these factors provide reason to conclude that a term of incarceration of 60 months is sufficient to meet the goal of individual deterrence.

OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT

Mr. Powell objects to one aspect of the PSR. Probation has included a section entitled, "Other Arrests." (PSR ¶¶78-80.) It is a basic tenet of due process that a defendant is presumed innocent. One corollary of this principle is that an arrest alone has no legal significance that may bear on a Court's sentencing decision. The Second Circuit made this clear in United States v. Juwa, 508 F.3d 694, 701 (2d Cir. 2007). There the District Court appeared to consider the fact that the defendant had been indicted on several counts of sexual abuse in state court as a basis for enhancing his sentence on his federal conviction for possessing child pornography. The Second Circuit vacated the sentence and remanded the case for resentencing, "holding to the prescription that at sentencing, an indictment or a charge within an indictment, standing alone and without independent substantiation, cannot be the basis upon which a criminal punishment is imposed."

Nor may the information be included in the PSR even if it does not inform the Court's sentencing decision. The function of a PSR is to provide a District Court with accurate and relevant information on which to base its assessment of what sentence is appropriate in a given case. The information about Mr. Powell's "other arrests" does not meet either standard. Paragraph 78 describes a supposed arrest almost ten years ago for possession of an imitation firearm. There is no docket listed, and the author of the PSR notes that there is no known disposition of the case. A "representative of the Bronx County Criminal Court was unable to locate a record for this *arrest* in any of the Bronx County Courts." (PSR at ¶78.)(Emphasis added.) What can be gleaned from these facts is that the New York City Police Department investigated a complaint concerning an imitation firearm, but the police did not arrest Mr. Powell on any charge related to the complaint.

The information in paragraph 79 is equally irrelevant. Again there is no docket provided. The PSR notes that the Bronx District Attorney's Office "declined to prosecute" the offense. In other words, the arrest, if there was one, was an arrest alone, to which no significance may be attached.

The last "other arrest" mentioned is, in fact, Mr. Powell's federal arrest for the instant prosecution. As the PSR notes, Mr. Powell was arrested on April 27, 2016, on the federal warrant. Members of the New York City Police Department participated in the "take down" in this case. Thus, Mr. Powell was "arrested" by the NYPD, but he was arrested on federal, not state, charges. This is distinct from a situation in which state authorities first charge a defendant with an offense and the federal government later charges the defendant with the same offense. Mr. Powell was not arrested on state charges on April 27, 2016. This paragraph should be stricken.

In addition to the due process bar to considering other-arrests that did not lead to dispositions, Rule 32 of the Federal Rules of Criminal Procedure supports the conclusion that such information should not be included in the PSR. That Rule states that a PSR must contain a calculation of the appropriate Guideline range, "any factors relevant to ... the appropriate sentence within the applicable sentencing range;" and "any bases for departing from the applicable sentencing range." Fed. R. Crim. Pro. 32(d)(1)(B), (d)(1)(D)(ii) and (d)(1)(E). A defendant's "prior criminal record" must also be included in the report. Fed. R. Crim. Pro. 32(d)(2)(A)(i). The rule does not suggest that the PSR list a defendant's prior arrests.

Due process and Rule 32 prohibit including information in a PSR about prior arrests that did not lead to dispositions. Having that information in the report not only implicate constitutional and statutory concerns, it also creates a practical problem for a defendant. The Bureau of Prisons considers what that is included in a PSR in determining a defendant's classification and in making an assessment of a defendant's eligibility to participate in programs. Mr. Powell asks that the Court order that ¶¶78-80 be stricken from the PSR.

CONCLUSION

Mr. Powell is a very young man. At 22, he is hardly a "man" at all. In his short life he has made many bad choices. On occasion, he has hurt those who love him. He indisputably has violated the law. Although Mr. Powell did not quickly learn the appropriate lesson from his prior prosecutions, there are several reasons to believe that he has changed. He is introspective about what he did that lead to the instant prosecution. He has shared the reality of his life – good and bad – with his parents. Mr. Powell also has developed a plan for his future that will help him from reoffending: get his GED, learn a trade, and, when he is released after serving his sentence, move away from New York, a goal that as an adult he can now achieve.

For all of these reasons, Mr. Powell asks that the Court impose a sentence of incarceration of 60 months.

Respectfully submitted,

___________/s/_____________
Stephanie M. Carvlin

cc: AUSA Rachel Maimin (via ECF)
AUSA Jessica Feinstein (via ECF)